Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

EVELYN M. FRANCES,

Petitioner

V.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether an individual who was charging party, but who did not intervene in a pending EEOC action brought on her behalf is precluded under Section 706 (f)(1) of Title VII 42 U.S.C. Section 2000e-5(f)(1) (1988), from bringing a civil action against her employer after the EEOC action has been settled by a consent decree.

All the parties in the United States Court of Appeals for the Fourth Circuit are listed in the caption.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EVELYN M. FRANCIS,

Petitioner

V.

AMERICAN TELEPHONE & TELEGRAPH CO.,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Evelyn M. Francis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the court appeals is an unpublished opinion. It is reproducerd in Appendix A of this Petition. The opinion of the district court is reproduced in Appendix B.

JURISDICTION

The opinion of the court of appeals was entered January 19, 1994. The jurisdiction of this Court rests upon 28 U.S.C. #1254 (1).

STATUTES INVOLVED

The statutes involved are set forth in Appendix C. They are:

Section 706 (f) (1), Title VII, Civil Rights Act of 1964, 42 U.S.C. # 2000e - 5 (f) (1). Appendix C.

STATEMENT OF THE CASE

This case addresses the issue concerning a private individual's right to bring an employment discrimination suit under Section 706 (f) (1) of Title VII, after suit by EEOC, settlement by Consent decree Between EEOC and the employer and a dismissal with prejudice when the private individual did not intervene or consent to said settlement. In 1988 and 1989. plaintiff Evelyn Francis filed two charges with the Equal Employment Opportunity Commission (EEOC) alleging that, inter alia, defendant American Telephpne & Telegraph Company ("AT&T") had given her low performance appraisals and demoted her in retaliation for her protests for acts made unlawful by Title VII. The

EEOC issued a determination that there was reasonable cause to believe that plaintiff's demotion and adverse evaluation in November 1988 were in retaliation for her protests of acts made unlawful by Title VII.

Thereafter, on September 19, 1990, the EEOC brought suit against AT&T on behalf of plaintiff. After extensive discovery, the EEOC and respondent entered into settlement negotiations. However, at that time, plaintiff indicated that she would not be a party to the settlement proposed by the EEOC and AT&T because it was unsatisfactory to plaintiff. Notwithstanding, EEOC and defendant entered into a Stipulation of Settlement and Dismissal and a Settlement Agreement. As a result of this settlement, the Court dismissed with prejudice EEOC's case against the defendant.

Plaintiff did not seek to intervene in the prceedings. After receiving a right to sue letter from the EEOC, Ms. Francis instituted a civil action on her own behalf against AT&T. (Right to Sue. Appendix D)

On August 9, 1993, a judgement was entered by the U.S. District Court For The Middle District of North Carolina granting defendant's Motion to Dismiss for lack of subject mstter jurisdiction and for failure to state a claim upon which relief could be granted pursuant to Rules 12 (b)(1) and 12 (b)(6) of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

A. THERE IS A SPLIT AMONG THE CIRCUITS ON AN ISSUE OF WIDESPREAD IMPORTANCE AS TO WHETHER SECTION 706 (F) (1) PRECLUDES SUITS BY INDIVIDUALS WHO ARE CHARGING PARTIES BUT WHO HAVE NOT INTERVENED IN THE PENDING EEOC ACTION IN THEIR BEHALF, ONCE THE EEOC ACTION HAS BEEN CONCLUDED.

In 1983 the Fourth Circuit held that "We read Section 706 (f) (1) in these circumstances to preclude suits by individuals who are charging parties, but who have not intervened in the pending EEOC action in their behalf, once the EEOC action has been concluded by a consent decree." Adams v. Proctor and Gamble Manufacturing Company. 697 F. 2d 582,

583 (4th Cir. 1983). The court in the instant case followed Adams, supra.

This issue has not been addressed by the Supreme Court of the United States, although General Telephone Company of the Northwest., Inc. v. EEOC, 446 U.S. 319, 100 S. Ct. 1698 (1980) has been cited by Courts in support for the position that private suits are not precluded.

The Eleventh Circuit in 1990 addressed the precise issue as in the instant case and held that the plaintiff was not precluded by a prior EEOC suit from bringing a private action. Riddle v. Cerro Wire and Cable Group, Inc. 902 F. 2d 918 (11th Cir. 1990). In so ruling the Eleventh Circuit expressly declined to follow the earlier decision of the

Fourth Circuit. Because the Equal Employment Opportunity Commission continues to issue right to sue Letters and because of the recent decision in Riddle, the plaintiff herein is urging this court to visit this issue. Appendix "D".

In Riddle, supra, the EEOC attempted to conciliate plaintiff's charge, but was unsuccessful. More than 180 days after Riddle filed her charge, the EEOC filed suit against Cerro, alleging violations of Title VII. Riddle was not satisfied with the settlement and requested and received a right to sue letter. The EEOC noted that Riddle would not be bound by the settlement. Following the settlement Riddle filed suit against Cerro alleging essentially the same charges that formed the basis of the EEOC's suit against Cerro. Riddle, supra 9i9. The District Court

granted summary judgment against Riddle and concluded that Riddle should have exercised her statutory right to intervene in the EEOC suit if she wished to protect her individual rights in that litigation. The Court reasoned that Riddle was not unfairly prejudiced and was aware of the terms of the settlement.

The Eleventh Circuit rejected this argument, the position stated in Adams, supra, and McClain v. Wagner Election Corp. 550 F. 2d 1115 (8th Cir.1977). They concluded that under the plain terms of the statute, EEOC was obligaterd to issue the right to sue letter to plaintiff. The Court found General Telephone Co. v. EEOC, supra, 446 U.S. at 326 to be instructive (emphasis added):

"Under Section 706 (f) (1), the aggrieved person may bring his own action at the expiration of the 180 days period of exclusive EEOC administrative jurisdiction if the agency has failed to move the case along to the parties satisfaction, has reached determination not to sue, or has reached a conciliation or settlement agreement with the respondent that the party finds unsatisfactory".

The purposes of the provision--to prevent the Commission from binding charging parties to settlements which they do not approve--is as important after suit has been filed as it is beforehand. Congress recognized that in addition to protecting the rights of individuals the Commission is concerned with achieving broad social and economic objectives of Title VII and is, therefore, authorized to obtain the

most satisfactory overall relief when competing interest are involved. General Telephone Co. v. EEOC, supra. Individual employees may well be more interested in being compensated for the wrongs they have suffered individually and may be willing to hold out for full restitution. These potentially conflicting interests of the Commission and charging parties do not change when suit is filed.

The statutory right of intervention is an ineffective means of protecting the rights of individual charging parties when the Commission settles a suit.

Even if a charging party were able to intervene in a suit which the Commission had decided to settle, either because she learned of a settlement prior to its execution or because a court permitted intervention after settlement, no purpose would be served which could not be served more easily by permitting a subsequent suit. Because the charging party's rights are independent of those of the Commission's,

the charging party's intervention would not effect the Commission's rights to settle its lawsuit. As General Telephone, supra., recognizes, the Commission's authority to sue and to settle its suit in accordance

with its mission of eradicating empoloyment discrimination is independent of the charging party's right to sue. Therefore, it is clear that were a charging party to intervene in a Commission suit, she could, of course, decline to settle and prosecute her own claim on the merits. That, is precisely what plaintiff seeks to do in this suit.

This issue has extraordinary importance for the administration of Title VII. In light of the importance of the issue and the fact that the circuits are split, this is an appropriate case for This Court to establish a standard for the guidance of the lower courts.

CONCLUSION

For the above reasons, the petition for Writ of certiorari should be granted.

This the 19th day of April, 1994.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EVELYN M. FRANCIS,

Petitioner,

V.

AMERICAN TELEPHONE & TELEGRAPH CO.,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

EVELYN M. FRANCIS,
Plaintiff-Appellant,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant-Appellee.

No. 93-2148

Appeal from the United States District Court
for the Middle District of North Carolina, at Greensboro.
Hiram H. Ward, Senior District Judge.
(CA-92-293-2)

Submitted: December 30, 1993

Decided: January 19, 1994

Before WILKINS, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Romallus O. Murphy, Greensboro, North Carolina, for Appellant. M. Daniel McGinn, William P. H. Cary, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P., Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Evelyn M. Francis appeals from the district court's dismissal, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), of her Title VII, 42 U.S.C. § 2000e-3 (1988), complaint. Finding no error, we affirm.

Upon finding reasonable cause to support Francis' allegations of retaliatory demotion and poor performance appraisals by her employer, American Telephone & Telegraph Company ("AT&T"), the Equal Employment Opportunity Commission ("EEOC") brought suit against AT&T on behalf of Francis. The EEOC and AT&T eventually reached a settlement, and the case was dismissed with prejudice by consent decree. Francis refused to participate in the settlement negotiations and never sought to intervene in those proceedings. Her subsequent attempt to pursue these same claims in a separate lawsuit resulted in the dismissal appealed herein.

Francis concedes that this case is controlled by an earlier in banc decision of this Court: "We read § 706(f)(1) [of Title VII, 42 U.S.C. § 2000e-5(f)(1) (1988),] in these circumstances to preclude suits by individuals who are charging parties, but who have not intervened in the pending EEOC action in their behalf, once the EEOC action has been concluded by a consent decree." *Adams v. Proctor & Gamble Mfg. Co.*, 697 F.2d 582, 583 (4th Cir. 1983) (in banc), *cert. denied*, 465 U.S. 1041 (1984). However, Francis requests reversal of that decision.

Because this panel cannot overrule the decision of a prior panel in this Circuit, *Brubaker v. Richmond*, 943 F.2d 1363, 1381-82 (4th Cir. 1991), or an in banc rehearing by this Court, *see Ross v. Reed*, 704 F.2d 705, 707 (4th Cir. 1983), *aff'd*, 468 U.S. 1 (1984), we must refuse Francis' request. Moreover, contrary to Francis' contention, the Eleventh Circuit's decision in *Riddle v. Cerro Wire & Cable Group*,

Inc., 902 F.2d 918 (11th Cir. 1990), neither repudiates nor warrants reversal of *Adams*. Hence, we find the district court properly relied on *Adams* as grounds for dismissing Francis' action, and affirm that result. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

Entered on Docket
R(55) (a)
Aug. 9, 1993
By: Ji

APPENDIX B

Filed
Aug. 8, 1993
Office Clerk U.S.
District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION
NO. 2:92CV00293

EVELYN FRANCIS,	:
	:
Plaintiff	:
	:
V.	:
	:
AMERICAN TELEGRAPH AND TELEPHONE COMPANY,	:
	:
Defendant	:

MEMORANDUM OPINION AND ORDER

WARD, Senior Judge

This matter comes before the Court on defendant's Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief casn be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated herein, the Court will grant defendant's motion.

I.

In 1988 and 1989, plaintiff Evelyn Francis filed two complaints with the Equal Employment Opportunity Commission ("EEOC") alleging, inter alia, that defendant American Telegraph and Telephone Company ("AT&T") had given her low job performance appraisals and demoted her in retaliation for her protests of acts made unlawful by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988). The EEOC conducted an investigation of the charges and later issued a determination that there was reasonable cause to believe that plaintiff's demotion and adverse evaluation in November 1988 were in retaliaton for her protest of acts made unlawful by Title VII.

Thereafter, on September 19, 1990, the EEOC brought suit against defendant on behalf of plaintiff as the charging party. After extensive Discovery, the EEOC and defendant entered into settlement negotiations. However, at that time, plaintiff indicated that she would not be a party to the settlement proposed by the EEOC and defendant. Nevertheless, the EEOC and defendant entered into a Stipulation of Settlement and Dismissal and a Settlement Agreement. As a result of this settlement, the Court dismissed with prejudice the EEOC"s case against defendant.

At no time during the pendency of the proceedings by the EEOC against defendant did plaintiff seek to intervene or actually intervene in the proceedings.

Instead, after settlement of the case between the EEOC and defendant, plaintiff requested and received a right-to-sue letter from the EEOC. Soon thereafter, plaintiff instituted this civil action on her own behalf against defendant, asserting the same factual and legal bases for her cause of action as had been previously asserted by the EEOC on her behalf in its case against defendant.

II.

This case raises the issue of whether an individual who was a charging party, but who did not intervene in a pending EEOC action brought on her behalf, is precluded under §706(f)(1) of Title VII, 42 U.S.C. §2000e-5(f)(1) (1988), from bringing a civil action against her employer after the EEOC action has been settled by a consent decree. Finding that such an action is prohibited, the Court will grant defendant's Motion to Dismiss.

It is settled law in this Circuit that §706(f)(1) "preclude(s) suits by individuals who are charging parties, but who have not intervened in the pending EEOC action in their behalf, once the EEOC action has been concluded by a consent decree." Adams v. Proctor and Gamble Mfg. Co., 697F.2d 582, 583 (4th Cir.1983) (en banc)[1] Thus, the proper disposition of the charging party's civil case is dismissal where a charging party on whose behalf the EEOC instituted an action fails to intervene in that lawsuit, and thereafter attempts to file suit on his own behalf after the EEOC has settled the case with the employer. Id.

[1] Originally a majority panel in Adams held that § 706(f)(1) had no preclusive effect on the ability of a charging party to bring an individual action against an employer under these circumstances. See Adams v. Proctor and Gamble Mfg. Co, 678 F. 2d 1190 (4th Cir. 1982). Thereafter, however, an en banc court reversed the majority's decision and ruled as indicated above.

The Adams decision is directly applicable to the instant matter and controls the disposition of the case. As in Adams, plaintiff here failed to exercise her unqualified right to intervene in the EEOC proceedings brought on her behalf. The Adams court's decision instructs that such inaction by plaintiff is tantamount to a voluntary waiver of her right to reject the settlement between the EEOC and defendant.

She cannot now complain of the consequences of her own inaction and on the basis of an invalidly issued EEOC right-to-sue letter bring a civil suit against defendant.

To her credit, plaintiff concedes that the Adams decision is dispositive on this case, but urges the Court to revisit the issue raised herein in light of the Eleventh Circut's decision in Riddle v. Cerro Wire and Cable Group, 902 F. 2d 918 (11th Cir. 1990).

In Riddle, that Court held that a charging party was not precluded from bringing a subsequent individual suit where an EEOC suit brought on the charging party's behalf had previously been settled without the charging party's intervention. In so doing, the Riddle court declared that the plain terms of the statute obligated the EEOC to issue the right-to-sue letter and that such a letter was valid. Id. at 921.

It goes without saying that any published decision of the Fourth Circuit Court of Appeals is binding upon this Court as well as subsequent panels of the appellate court, unless or until the decision is reconsidered en banc or is overturned by the United

States Supreme Court. See Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 642 (4th Cir. 1975).[2] Here, should there have been an absence of Fourth Circuit precedent addressing this issue or if the instant case was distinguishable from the Adams decision, the Court might consider revisiting the issue in light of the Riddle case. However, such is not the case. Clearly, the Adams case is directly on point and requires that the Court find that the

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[2] This principle applies a fortiori where, as in the instant case, the dispositive decision on the contested issue in a case was rendered by an en banc court.

right-to-sue letter issued to plaintiff by the EEOC was invalid. Thus, since plaintiff filed this lawsuit without the benefit of a valid right-to-sue letter, the Court lacks subject matter jurisdiction over plaintiff's Title VII Claim. Accordingly, the Court is compelled to dismiss plaintiff's action pursuant to Rule 12(b) (1) of the Federal Rules of Civil Procedure.

IT IS, THEREFORE, ORDERED that defendant's Motion to Dismiss be, and the same hereby is, GRANTED, and that this action be, and the same hereby is, DISMISSED.

/s/ HIRAM H. WARD
United States District Judge

August 9th 1993.

Entered on Docket
R(55) (a)
Aug. 9, 1993 By: Ji

Filed
Aug. 8, 1993
Office Clerk U.S.
District Court
By: Ji

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION
NO. 2:92CV00293

EVELYN FRANCIS,	:
	:
Plaintiff	:
	:
V.	:
	:
AMERICAN TELEGRAPH AND TELEGRAPH COMPANY,	:
	:
Defendant	:

J U D G M E N T

This matter comes before the Court on defendant American Telegraph and Telephone Company's Motion to Dismiss for lack of subject mstter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. For the reasons stated in the Memorandum Opinion and Order entered contemporaneously herewith, the Court will grant defendant's Motion to Dismiss for lack of subject matter jurisdiction.

IT IS, THEREFORE, ORDERED that defendant's Motion to Dismiss be, and the same hereby is, GRANTED, and that this action be, and the same hereby is, DISMISSED.

/S/ HIRAM H. WARD
UNITED STATES DISTRICT JUDGE

AUGUST 9TH , 1993.

APPENDIX C

42 U.S.C. § 2000e-5(f)(1), which provides in relevant part:

(f)(1) If within thirty days after a charge is filed with the Commission..., the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge...

The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission...

If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge...the Commission has not

filed a civil action under this section...,
or the Commission has not entered into
a conciliation agreement to which the person
aggrieved is a party, the Commission...shall
so notify the person aggrieved and within
ninety days after the giving of such notice
a civil action may be brought against the
respondent named in the charge (A) by the
personclaiming to be aggrieved...

filed a civil action under this section...,
or the Commission has not entered into
a conciliation agreement to which the person
aggrieved is a party, the Commission...shall
so notify the person aggrieved and within
ninety days after the giving of such notice
a civil action may be brought against the
respondent named in the charge (A) by the
personclaiming to be aggrieved...

APPENDIX D

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
CHARLOTTE DISTRICT OFFICE

February 13, 1992

Evelyn M. Francis
Route 5 Box 265-B
Burlington, NC 27215

Dear Ms. Francis:

On September 19, 1990, the Equal Employment Opportunity Commission (EEOC) filed an employment discrimination lawsuit in the United States District Court for the Middle District of North Carolina against American Telephone and Telegraph Company. The title of the suit was **Equal Employment Opportunity Commission v. American Telephone and Telegraph Company**, Civil Action No. 2:90CV00478. In the interest of resolving the action without contested litigation, EEOC and American Telephone and Telegraph Company reached a settlement, the terms of which are contained in a "Settlement Agreement".

This Settlement Agreement, which is enforceable by the parties to the litigation, is availble for your review at the Raleigh Area Office of the Equal Employment Opportunity Commission in Raleigh, North Carolina.

This notice is sent to you because your rights are affected by the terms of the Settlement Agreement.

As you may recall, during the negotiations beteeen EEOC and AT&T, the company agreed to make a monetary payment to you and offered other terms of settlement involving your employment that you found unacceptable. You were informed at the time that EEOC would settle the action whether or not you were agreeable to the remedial provisions that directly affected you. Ultimately, EEOC concluded that the terms agreed to by the Company represented the best resolution of the suit and the matter was settled by Stipulation of Settlement and Dismissal approved by the Court on October 29, 1991.

However, since you were not agreeable to the remedial terms which would have accured to you, your rights under Title VII to pursue a private action against AT&T were not affected by the settlement. In other words, although EEOC is no longer in litigation against AT&T on your behalf, you have the right to bring a private action against the company in which you may assert the issues which were raised by the EEOC suit, i.e., the allegation that you were retaliated against when you were demoted in February 1988, and when you received a poor performance evaluation in November of 1988.

Unfortunately, and for this I offer my apologies, at the time the suit was settled, you were not sent a Notice of Right to Sue, nor informed of your right to bring suit. My colleague Terry Knox left our employ at the same time the suit was settled, and in the confusion that followed, this matter was overlooked. Enclosed with this letter you will find a Notice of Right to Sue. **As the Notice states: IF YOU DECIDE TO BRING SUIT, YOU MUST DO SO WITHIN 90 DAYS FROM THE RECEIPT OF THIS NOTICE OF RIGHT TO SUE, OTHERWISE YOUR RIGHT TO SUE IS LOST.**

If you have any questions about this Notice you may consult an attorney of your choice or call me collect at 919-856-4070.

Sincerely,

/s/ JOHN B. MEUSER
Senior Trial Attorney

cc: Mr. M. Daniel McGinn
Counsel for AT&T